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6 IN THE UNITED STATES DISTRICT COURT FOR THE
7 EASTERN DISTRICT OF CALIFORNIA

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AARON DAVIS,) No. CV-F-05-271 OWW/DLB
)
10) ORDER GRANTING DEFENDANTS'
11 Plaintiff,) MOTION TO STRIKE AMENDED
12 vs.) COMPLAINT (Doc. 35) AND
13) STRIKING THIRD AMENDED
14) COMPLAINT (Doc. 34)
15)
16)
FOSTER FARMS DAIRY, et al.,)
)
15)
16) Defendant.)
16 _____)

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On November 13, 2006, Plaintiff Aaron Davis, proceeding *in pro per*, filed an "Amended Complaint with Supplemental Facts". (Doc. 34).

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Defendants move to strike this Amended Complaint pursuant to Rule 12(f), Federal Rules of Civil Procedure, because Plaintiff failed to obtain permission to file the Amended Complaint as required by Rule 15(a), Federal Rules of Civil Procedure.

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Plaintiff, who appeared at the hearing, did not file a written opposition to the motion to strike. Rule 78-230(c), Local Rules of Practice, provides in pertinent part:

Opposition, if any, to the granting of the motion shall be in writing and shall be filed with the Clerk not less than fourteen (14) days preceding the noticed (or continued) hearing date. Opposition shall be [served] on opposing counsel not less than fourteen (14) days preceding the hearing date (personal service) or mailed or electronic served not less than seventeen (17) days preceding the hearing date. A responding party who has no opposition to the granting of the motion shall serve and file a statement to that effect, specifically designating the motion in question. No party will be entitled to be heard in opposition to a motion at oral argument if opposition to the motion has not been timely served by that party.

Initially, Plaintiff was one of a trio of plaintiffs who brought an action against Defendants in No. CV-F-04-6634 REC/DLB. By Order filed on February 24, 2005, Plaintiff's claims were severed and Plaintiff was directed to file an Amended Complaint in a separate civil action. After receiving an extension of time, Plaintiff filed the Amended Complaint (hereinafter referred to as the First Amended Complaint or FAC) commencing this action on June 15, 2005.¹ Defendants filed an Answer to the FAC on April 17, 2006. A scheduling conference was held on October 20, 2006. Pursuant to the Scheduling Order filed on October 23, 2006, "[t]he parties do not anticipate filing any amendments to the pleadings at this time." However, on October 25, 2006, Plaintiff filed a motion for an extension of time to submit

¹Plaintiff filed an Amended Complaint on February 24, 2005, giving it the case number No. CV-F-04-6634 REC/DLB. Because this pleading was filed on the same day as the Order severing Plaintiff's claims, it is disregarded for purposes of this motion.

1 "supplemental facts". On October 27, 2006, Plaintiff filed a
2 "Second Amended Complaint for Damages and To Turn in Supplemental
3 Facts" (hereinafter referred to as the Second Amended Complaint
4 or SAC) without first having obtained leave of court to do so.
5 Defendants filed an Answer to the SAC on November 13, 2006. Also
6 on November 13, 2006, Plaintiff filed an "Amended Complaint with
7 Supplemental Facts" (hereafter referred to as the Third Amended
8 Complaint or TAC) without first obtaining leave of court.

9 Rule 15(a) provides in pertinent part:

10 A party may amend the party's pleading once
11 as a matter of course at any time before a
12 responsive pleading is served ... Otherwise a
13 party may amend the party's pleading only by
leave of court or by written consent of the
adverse party; and leave shall be freely
given when justice so requires.

14 As explained in Wright, Miller & Kane, Federal Practice and
15 Procedure: Civil 2d § 1484 at pp. 601-602:

16 In general, if an amendment that cannot be
17 made as of right is served without obtaining
the court's leave or the opposing party's
18 consent, it is without legal effect and any
new matter it contains will not be considered
unless the amendment is resubmitted for the
19 court's approval. However, some courts have
held that an untimely amended pleading served
20 without judicial permission may be considered
as properly introduced when leave to amend
would have been granted had it been sought
and when it does not appear that any of the
21 parties will be prejudiced by allowing the
change. Permitting an amendment without
formal application to the court under these
circumstances is in keeping with the overall
22 liberal policy of Rule 15(a) and the general
desirability of minimizing needless
23 formalities. On the other hand, a more
restrictive attitude toward the failure of a
24 party to proceed in the manner prescribed by
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1 the rule could be justified if it becomes
2 necessary to discourage litigants from
3 totally disregarding the requirements of
4 subdivision (a).

5 In the Amended Complaint filed on June 15, 2005, Plaintiff
6 names as defendants Foster Farms Dairy, David Bettancourt, Plant
7 Manager for Foster Farms Dairy, and Ron Foster, owner of Foster
8 Farms Dairy. The Amended Complaint alleges that it is brought
9 for employment discrimination in violation of Title VII. The
10 Amended Complaint alleges that Plaintiff's employment was
11 terminated in February 2005 "after he was subpoenaed for a
12 deposition regarding a Foster Farms which involved discriminatory
13 action(s) against African Americans and where Plaintiff was under
14 oath and disclosed the discriminatory action(s) of Foster Farms
15 and 28 other related issues that Foster Farms did not want
16 disclosed" [sic]; that Defendants' "employment practice or
17 policies ... has had a discriminatory effect or impact upon him
18 for the last fifteen years"; that Defendants "refusal to promote
19 African Americans and loss of employment-related opportunities
20 constitute [sic] a disparate treatment in that it was based on
21 the fact that plaintiff was terminated for his support of African
22 American rights"; that Plaintiff "bases this conclusion on the
23 fact that defendants continued to seek applicants
24 (White/Caucasian) for either management positions or employment
25 opportunities"; and that during his employment at Foster Farms
26 Dairy "he was subject to racial comments, epithets and slurs at
 the workplace including, but not limited to the following:

1 'NIGGER LOVER' and 'Fuck You Tanto'." The Second Cause of Action
2 is captioned "Director's and Supervisors Liability" and alleges
3 that Defendants "were at all times on notice of the acts (or
4 should have been on notice) of racial discrimination and bigotry
5 toward African American race and his friends national origin but
6 failed to take appropriate steps to terminate these defendants,
7 and DOES 1 through 10, inclusive, who engaged in such
8 discriminatory acts", and that Defendants thereby ratified and
9 affirmed such discriminatory conduct. The Third Cause of Action
10 is for intentional infliction of emotional distress. The Fourth
11 Cause of Action is for Injunctive Relief, alleging that "[u]nless
12 restrained and enjoined from the racially motivated
13 discrimination described in the preceding paragraphs of this
14 pleading and compelled to appear and show cause why they should
15 not be disqualified from participation in all federal, state and
16 local programs, defendants ... will continue to engage in racial
17 discrimination in employment in violation of law, and plaintiff
18 will continue to suffer irreparable injury." The Fourth Cause of
19 Action prays for a "Preliminary and Permanent Injunction and
20 Order to Show Cause":

21 a) For Order prohibiting defendants ... and
22 every person or business entity that employs
23 or is owned or controlled by any defendant(s)
24 with knowledge of the Court's Order from
engaging in any act of discrimination in
employment based on race, national origin,
age, gender or gender preference that is
prohibited by law; and
25
26 b) For Order requiring defendants ... and
every person or business entity that employs

1 or that is owned or controlled by any
2 defendant(s) with knowledge of the Court's
3 Order to hire or promote qualified persons of
female, Afro Americans [sic], and Hispanic
origin at all levels staffing and management
in proportion to each group's statistical and
numeric representation in Fresno County,
California as a remedy for past racial and
ethnic discrimination by defendant ...; and

6 c) For Order prohibiting defendants ... and
every person or business entity that employs
or that is owned or controlled by any
defendant(s) with knowledge of the Court's
Order from applying for, cashing, or
receiving any benefits, direct or indirect,
from any federal, state, or local program(s)
of any kind unless and until defendants (1)
have made plaintiff whole of and from the
injury, damage, and loss caused by
defendant's discriminatory conduct in
employment described in this pleading [sic];
and (2) have proven to the satisfaction of
this Court by a preponderance of the evidence
that FOSTER FARMS DAIRY INC. has terminated
its relationship of every kind with all
persons who aided, abetted, facilitated, or
engaged in the discriminatory acts complained
of herein; (3) have proven to the
satisfaction of this Court by a preponderance
of the evidence that FOSTER FARMS DAIRY inc.
has hire and promote qualified persons of
female, African Americans, and Hispanic
origin at all levels staffing and management
within defendant FOSTER FARMS DAIRY INC. in
proportion to each group's statistical and
numeric representation in Fresno County,
California as a remedy for past racial and
ethnic discrimination by defendants

21 In addition to this injunctive relief, the FAC prays for
22 compensatory, general and punitive damages, and for the Court "to
23 set aside the general release".

24 The SAC filed on October 27, 2006, without prior leave of
court, essentially alleges the same facts and causes of action
25 set forth in the FAC. However, the SAC includes new causes of

1 action. The Fifth Cause of Action is for "wrongful termination
2 in violation of the Federal False Claims Act" and the Sixth Cause
3 of Action is for "wrongful termination in violation of the State
4 False Claims Act". These causes of action are alleged against
5 Foster Farms Dairy and Does 1-5, allege that these defendants had
6 contracts or subcontracts to supply goods to the United States
7 and the State of California; that these defendants violated the
8 False Claims Acts by:

9 (A) They knowingly presented or caused to be
10 presented to the United States [or the State
of California] false or fraudulent claims for
payment;

11 (B) They knowingly made, used, or caused to
12 be made or used, a false record or statement
to get a false or fraudulent claim paid or
approved by the Government; or

14 (C) They knowingly made, used, or caused to
15 be made or used, false records or statements
to conceal, avoid, or decrease an obligation
to pay or transmit money or property to the
16 Government.

17 The Fifth and Sixth Causes of Action further allege that
18 "Plaintiff was harassed, retaliated, discriminated against, and
19 fired from his job in retaliation for his efforts to investigate
20 the false claims described herein" in violation of 31 U.S.C. §
21 3730(h) and California Government Code § 12653. The Seventh
22 Cause of Action in the SAC is against Foster Farms Dairy and Does
23 1-5 for "wrongful termination in violation of public policy" and
24 alleges that Plaintiff's firing was in violation of the public
25 policies of the Federal False Claims Act, the California False
Claims Act, the California Fair Employment and Housing Act and 2

1 Cal.Code Regulations § 7287.8, and the Equal Opportunity Act, 29
2 C.F.R. Pt. 1604.11, and EEOC Directives 915.003. The SAC prays
3 for compensatory, general and punitive damages and injunctive
4 relief with regard to the First through Fourth Causes of Action.
5 With regard to the Fifth and Sixth Causes of Action, the SAC
6 prays for "two times plaintiff's lost earnings", for compensatory
7 damages, "including lost earning capacity, and medical and other
8 expenses", general and punitive damages, for an "order
9 reinstating plaintiff with full seniority, including seniority
10 for the time he has lost". The Seventh Cause of Action prays for
11 compensatory damages, "including lost income and lost earning
12 capacity, and medical and other expenses", for general and
13 punitive damages; for "Defendant verify answer"; and for
14 "appropriate restitution be made because the CONSTITUTION DEMANDS
15 it to be done".

16 The TAC filed on November 13, 2006, without prior leave of
17 court, now alleges that Plaintiff brings this action for
18 employment discrimination pursuant to Title VII and that
19 plaintiff is acting as "relator ... on behalf of the United
20 States of America and individually". The SAC also alleges that
21 jurisdiction is based on 42 U.S.C. § 1981 and alleges with regard
22 to jurisdiction and venue:

23 Plaintiff action seeks to remedy Defendant
24 wrongful conduct through the following claims
25 for relief: violations of Federal
Whistleblowers Protection Act contained in 31
U.S.C.A. Section 3730(h); violations of
California Whistleblowers Protection Act;
26 wrongful discharge ... in violation of public

1 policy; breach of implied and/or express
2 contracts entered into by Defendant and
3 Plaintiff; negligence; and punitive
damages....

4 The TAC alleges essentially the same causes of action as alleged
5 in the SAC with, for the most part, minor changes. For instance,
6 the Second Cause of Action for Director's and Supervisor's
7 Liability, the allegation that Defendants were on notice of
8 racial discrimination and bigotry toward "African American race
9 and his friends [sic] national origin" is now that Defendants
10 were on notice of racial discrimination and bigotry toward
11 "minorities". In the Third Cause of Action for Intentional
12 Infliction of Emotional Distress, Plaintiff adds to the
13 allegation that Defendants' conduct caused Plaintiff emotional
14 and physical distress in his support of equal rights "and the
15 support and safety concern of the public". The TAC also includes
16 a new prayer for relief interspersed with the prayer for relief
17 set forth in the SAC. The new prayer for relief prays for
18 judgment:

19 a. Declaring the acts and practices
20 complained of herein are in violation of the
whistleblower protections contained in 31
U.S.C.A. § 3730(h);

21 b. Enjoining and permanently restraining the
22 violations of the whistleblower protections
contained in 31 U.S.C.A. § 3730(h);

23 c. Directing Defendant to place Plaintiff in
24 a position he would have held but for
Defendant's discriminatory and retaliatory
treatment of Plaintiff, and to make Plaintiff
whole for all earnings and benefits he would
have received but for Defendant's
discriminatory and retaliatory treatment

1 including but not limited to wages (including
2 front and back pay) and benefits and any and
3 all other relief afforded under the
 whistleblower protections contained in 31
 U.S.C.A. § 3730(h);

4 d. Directing Defendant to pay Plaintiff
5 general and compensatory damages in an amount
 to be proven at trial;

6 e. Directing Defendant to pay Plaintiff
7 special compensatory damages including but
 not limited to actual and anticipated wage
 loss in an amount to be proven at trial;

8 f. Directing Defendant to pay the cost of
9 this action together with costs and
 reasonable attorney's fees;

10 g. Declaring Defendant's acts against
11 Plaintiff as willful, wanton, and malicious,
12 and directing Defendant pay Plaintiff
 punitive damages in an amount to be proven at
 trial; and

13 h. Granting such other and further relief as
14 this court deems proper.

15 i. Determine restitution in a manner that's
16 [sic] appropriate and enter the appropriate
 restitution order.

17 j. Demand jury trial on all issues triable
18 by jury.

19 The TAC also sets forth the prayer for relief alleged in the SAC.

20 The only change is that the injunctive relief prayed for in
21 connection with the Fourth Cause of Action includes "Native
22 Americans" and "Asians" and includes "all appropriate counties
23 where employed through Foster Farms".

24 However, although the First Cause of Action in the TAC
25 continues to allege that Plaintiff was terminated in February
26 2005 after Plaintiff was subpoenaed for a deposition in a

1 discrimination case against Foster Farms Dairy and disclosed "a
2 few of the discriminatory action(s) of Foster Farms and 28 other
3 related issues that Foster Farms did not want disclosed", the
4 First Cause of Action includes some significantly different
5 allegations from those set forth in the FAC or the SAC.
6 Specifically, the TAC alleges:

7 9. Plaintiff alleges that one or more of
8 defendants' employment procedures, and or
practice and or policies of each defendant
has had a discriminatory effect and or impact
upon him for the last fifteen years.
9 Plaintiff bases this conclusion, among
10 others, on the findings written in the
reports from investigations and conclusions
written in reports upon completion of those
investigations. [¶] Plaintiff also bases this
11 conclusion on a foundation of facts that
exist from documents, creating paper trail
and or first hand knowledge and or real
12 stories from real people with affidavits who
have suffered harm from Dennis Bettencourt,
Foster Farms Dairy and or Ron Foster and or
real stories attached with affidavits from
13 real people explaining how Dennis
Bettancourt, Foster Farms Dairy and or Ron
Foster violate federal law and or state law
and our CONSTITUTION. One, of the many
14 illegal on-going, re-occurring illegal
subject matters existing within Foster
operations is of PUBLIC concern. For
15 economical gain Foster will disregard concern
for the PUBLIC and violate laws protecting
WE, THE PEOPLE. These 'evil ways' at Foster
exist even though a percentage of the PUBLIC
16 is harmed and even when our CONSTITUTION,
Federal Law, and or State Law is being
real stories attached with affidavits from
17 violated. Easily proven at TRIAL.

18 10. Plaintiff alleges that during his
employment the following occurred frequently;
19 subject to falsely accusing minorities,
wrongfully disciplining minorities and even
20 wrongfully terminating minorities and
occasionally Teamsters Union Representative
21 BOB QUINTANA and Foster Farms Human Resource
22

1 LUIS MIRANDA would be fully aware of the
2 entire scheme and do nothing, for they have
3 their own agenda and all shall be proven at
4 trial. [¶] The latter part of [Plaintiff's]
5 employment at the FOSTER FARMS DAIRY INC. he
was subject to threats, racial comments,
epithets and slurs at the workplace,
including, but not limited to the following:
'NIGGER LOVER' and 'Fuck You Tanto'.

6 Although Defendants decided not to challenge Plaintiff's
7 failure to obtain prior permission to file the SAC and filed an
8 Answer to the SAC, Defendants argue that the TAC should be
9 stricken:

10 ... If Plaintiff's Third Amended Complaint is
11 not stricken and Plaintiff is not reminded
that he must follow the Federal Rules of
12 Civil Procedure, he will continue filing
amended complaints throughout the litigation
as evidenced by Plaintiff filing [the TAC]
13 just two weeks after filing [the SAC]. Such
action confuses the issues and hinders the
trial and litigation process. Proceeding
with a clear operative complaint will
14 streamline the ultimate resolution of the
case.

15 Plaintiff's propensity for amending his
16 complaint with trivial and non-substantive
information also prejudices Defendants
because they are required to incur the time
and expense of filing amended answers
17 virtually identical to prior responses. To
the extent Plaintiff adds new facts or
identifies new persons in his complaints that
should have been included in the original or
18 first amended complaint, such action also
disrupts the discovery process - which is
under way. Defendants will be prejudiced and
deprived of the opportunity to present facts
or evidence that they would have offered in
19 defense if Plaintiff continues adding new
information throughout the litigation.

20 Defendants' motion to strike is GRANTED. As noted, the
21 Scheduling Order filed on October 23, 2006 stated that the

1 "parties do not anticipate filing any amendments to the pleadings
2 at this time." Despite this representation, Plaintiff has twice
3 filed amended pleadings. The Scheduling Order specifically
4 provides:

5 XVI. Compliance With Federal Procedure.

6 1. The Court requires compliance
7 with the Federal Rules of Civil Procedure and
the Local Rules of Practice for the Eastern
District of California. To aid the court in
the efficient administration of this case,
all counsel are directed to familiarize
themselves with the Federal Rules of Civil
Procedure and the Local Rules of Practice of
the Eastern District of California, and keep
abreast of any amendments thereto.

11 Even though Plaintiff is proceeding *in pro per*, he is required to
12 familiarize himself and comply with the Federal Rules of Civil
13 Procedure, the Local Rules of Practice for the Eastern District
14 of California, and any court orders. Rule 83-183(a), Local Rules
15 of Practice, provides in pertinent part:

16 Any individual representing himself ...
17 without an attorney is bound by the Federal
Rules of Civil ... Procedure and by these
18 Local Rules. All obligations placed on
'counsel' by these Local Rules apply to
19 individuals appearing in propria persona.
Failure to comply therewith may be ground for
20 dismissal ... or any other sanction
appropriate under these rules.

21 Rule 15(a) very clearly requires prior leave of court to file an
22 amended complaint after the defendants file a responsive
23 pleading, i.e., an Answer. Although discretion exists to allow
24 this action to proceed under the TAC, discretion will not be so
25 exercised here because of Plaintiff's repeated violation of Rule
26

1 15(a). Striking the TAC as inoperative and of no legal effect is
2 necessary to compel Plaintiff's compliance with the Federal Rules
3 of Civil Procedure and the Local Rules of Practice. If Plaintiff
4 desires to proceed with the allegations set forth in the stricken
5 TAC, Plaintiff must file a properly noticed and supported motion
6 for leave to amend as required by these rules.

7 For the reasons set forth above, Defendants' motion to
8 strike the Third Amended Complaint (Doc. 35) is GRANTED and the
9 Third Amended Complaint (Doc. 34) is STRICKEN.

10 IT IS SO ORDERED.

11 Dated: January 9, 2007
12 668554

13 /s/ **Oliver W. Wanger**
14 UNITED STATES DISTRICT JUDGE

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